



August 22, 2002

Mr. Mark Krause
Executive Director
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, California 95814

Re: FPPC Regulation 18531.7 Payments for Communications

Dear Mr. Krause:

I write on behalf of the California Federation of Labor, AFL-CIO, the California State Council of Service Employees International Union, and the California Teachers Association. The purpose of this letter is to petition the Commission to amend FPPC regulation 18531.7. This request is made pursuant to Government Code §11340.6.¹ My clients specifically request that this petition for amendment be placed on the Commission's September 5, 2002 meeting agenda.

Background

On August 9, 2002, the Commission considered proposed regulation 18531.7. This regulation was intended to interpret various provisions of Government Code §85312. Section 85312 provides in part

For purposes of this title, payments for communications to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure *are not contributions or expenditures*, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. (emphasis added)

In summary, Section 85312 creates an exception to the definition of the terms "contribution" and "expenditure." The exception relates to communications to members, employees or shareholders, or their families.

1. The FPPC is subject to the provisions of the Administrative Procedures Act as it existed in 1974 when the Political Reform Act was adopted. In 1974 the Government Code section corresponding to current section 11340.6 was section 11426. The old and new sections are substantially similar.

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At its meeting of August 9, 2002, the Commission considered various options presented to it by staff. Those options concerned, in part, subsection (a)(2) (defining member), subsection (a)(3) (defining member in the context of committees) and subsection (e) (regarding payments made at the behest of a candidate or committee). The Commission ultimately adopted a version of regulation 18531.7 that narrowed the definition of member, arguably excluded sponsored committees from the term "organization" and concluded that payments made at the behest of a candidate were "contributions."

Petition for Amendment

Attached to this letter is my clients' proposed amendment to regulation 18531.7 as adopted at the Commission's August 9, 2002 meeting. The proposed amendment adds specific language (identified by underline). In general, the proposed amendments address the following issues:

1. Section (a) and (d) are amended to provide that payments for member communications include payments made by an organization's sponsored committee. In addition, section (f) is amended to make clear that payments made by a sponsored committee for member communications are reported on campaign statements as member communications and not as contributions or independent expenditures.

2. Section (a)(2) is amended to clarify that a member includes those persons who have the right to vote for directors either directly or indirectly. In addition, the payment of dues at least annually would be a qualifying attribute of membership. Finally, the amendment makes clear that a member of a local union is considered a member of any intermediate union body or national or international union of the same union.

3. Section (e) is amended to provide that payments for member communications made at the behest of a candidate or committee are *not* contributions.

Reasons for Request

While we intend to provide a more detailed explanation as to the need for the proposed amendment to regulation 18531.7 in advance of the Commission's September 5, 2002 meeting (assuming this request is placed on that meeting agenda), below is a summary of the reasons for request.

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1. The current regulation as drafted creates confusion with respect to member communication payments made by an organization's sponsored committee. Section (d) makes no reference to sponsored committees when excluding third party payments from qualifying as member communications. This could lead to the conclusion that if an organization makes payments for communications to its members from its sponsored committee Section 85312 would not apply. Yet, section (f) specifically provides that when payments for member communications are made from a sponsored committee they must be reported. This would suggest that such sponsored committee payments can qualify under Section 85312, but they simply must be reported.

The proposed regulation makes clear that the member communication payments may be made from a sponsored committee, but must be reported as such.

2. As drafted, the regulation will exclude from the definition of "member" many legitimate nonprofit membership organizations, including labor unions. The current definition of member is limited to persons who have a right to vote for directors or to change the organizations articles or bylaws. Not all membership organizations are so structured. For example, certain labor organizations elect directors or amend articles and bylaws through a delegate system. In other words, members have certain voting rights to elect others who in turn elect directors or amend the bylaws and/or articles. Furthermore, the current regulation does not address the unique structure of labor organizations. Most local unions are affiliated with intermediate units of the union and often a national or international union. In addition, AFL-CIO unions are affiliated collectively through international, state and central labor councils.

The amendment makes clear that members can include those persons who can directly *and indirectly* elect directors or amend bylaws and articles. In addition, the payment of dues would be a qualifying attribute of membership. Finally, the amendment states clearly that union members belong to all intermediate units.

3. Section (e) as presently drafted appears to directly conflict with Section 85312. Section 85312 on its face states that payments for member communications are not contributions. Yet, section (e) of the regulation states that payments for member communications made "at the behest" of a candidate or committee are contributions. Because payments made "at the behest" of a candidate or committee are considered "contributions" there is no logical way to reconcile the regulation with the plain meaning of Section 85312.

A reference to the statutory and regulatory definitions of the term "contribution" may be instructive. The statutory definition of contribution is quite broad and includes any "payment . . . except to the extent that full and adequate consideration is received, unless it is clear from the

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surrounding circumstances that it is not made for political purposes." (Government Code §82015) The Commission's regulations add that a payment "made at the behest" of a candidate or committee is a contribution within the meaning of Section 82015 (FPPC Regulation §18215(a)(2)(A)).

Thus, any payment made at the behest of a candidate or committee is by definition a contribution. This includes not only monetary contributions donated to a candidate, but also nonmonetary contributions such as goods and services made at the behest of a candidate. For example, a candidate who requested that an organization mail brochures to voters urging her election would normally be receiving a nonmonetary contribution from the organization because the payments for the brochure were made "at the behest" of the candidate. However, Section 85312 creates an exception when that brochure is mailed only to the organization's members. Under Section 85312, no contribution results.

As presently drafted, regulation 18531.7 says just the opposite. The proposed amendments clarify that payments made at the behest of a candidate or committee are not contributions, thus making the regulation consistent with the statute.

Authority for Commission to take action requested

The Commission has clear authority to take the action requested. Government Code §83112 permits the Commission to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of this title."

On behalf of my clients I respectfully request that this petition to amend be granted and that the matter be set for hearing in accordance with the Administrative Procedures Act and your regulations.

Additional Request

In addition, I request that the Commission:

1. direct the staff to prepare an amendment that is consistent with this letter and attachment, and
2. delay the effective date of regulation 18531.7.

These additional requests are made due to the immediacy of the November general election. My clients have commenced plans which, if implemented, may conflict with the current draft of regulation 18531.7, but would be in conformity with the proposed amendment. Directing staff to prepare the amendment and delaying the regulation will avoid the need for my

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clients to significantly alter those plans only to have the regulation changed again in a matter of weeks.

Regarding the delay in the effective date, FPPC regulation 18312(e) permits the Commission to select a specific date other than the normal 30 days after filing with the Secretary of State. As presently scheduled the regulation is to take effect September 14, 2002. I urge the Commission to select a date on or after the date upon which it will consider the merits of the amendment.

Thank you for your consideration of this matter.

Very truly yours,

OLSON, HAGEL & FISHBURN, LLP



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Enclosure

cc: Art Pulaski (California Federation of Labor)
John Hein (California Teachers Association)
Dean Tipps (SEIU)
Luisa Menchaca, Esquire

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REVISIONS TO 18531.7

18531.7. Payments for Communications - Section 85312

(a) Organization Making the Payment. For purposes of Government Code section 85312, "payments for communications to members" are any payments made by an organization or its sponsored committee including but not limited to newsletters, letters and fliers to its members, employees or shareholders, or to the families of its members, employees or shareholders. "Payments for communications to members" do not include any payments made by an organization for general public advertising such as broadcasting, billboards, and newspaper advertisements or for communications to person who are not members, employees, or shareholders, or families of members, employees or shareholders of the organization.

(1) An "organization," other than a political party, means a sole proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, labor union and any other organization or group of persons acting in concert, including a committee as defined by Government Code section 82013, but excluding a candidate or individual.

(2) "Member" means any person who, pursuant to a specific provision of an organization's articles or bylaws, has the right to vote directly or indirectly for the election of a director or directors or an officer or officers or on a disposition of all or substantially all of the assets of the organization or on a merger or on a dissolution. "Member" also means any person who is designated in the articles or bylaws as a member and, pursuant to a specific provision of an organization's articles or bylaws, has the right to vote on changes to the articles or bylaws, or pays membership dues at least annually in an amount predetermined by the organization.

Members of a local union are considered to be members of any national or international union of which the local union is a part and of any federation with which the local, national, or international union is affiliated.

(3) A person is not a "member" of an organization if the person is only on a mailing or contact list of the organization without meeting the definition provided in subdivision (a)(2) of this regulation.

(4) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(5) "Family" means a member's, employee's, or shareholder's spouse, domestic partner as defined by Family Code section 297, dependent children, and parents who reside with the member, employee, or shareholder.

(b) An organization meets the requirements of subdivisions (a)(1) and (a)(2) of this regulation where it is comprised of 25 or fewer individuals and the communication is directed only to those individuals and their families,

(c) Calculation of Payments Subject to Government Code section 85312.

"Payments for communications" includes the following:

(1) Any payment made by an organization for costs directly attributable to the communication including but not limited to salaries, production, postage, space or time purchased, agency fees, printing and any additional administrative or overhead costs attributable to the communication.

(2) Any payment for costs directly attributable to a communication from an organization inadvertently delivered to persons other than member, employees, or shareholders or

families of members, employees, or shareholders provided those costs do not exceed \$100 or 5% of the total costs of the communication to an organization's members, employees, or shareholders or families of members, employees, or shareholders, whichever is higher, notwithstanding subdivision (c)(1) above.

(d) Notwithstanding any provision of Government Code section 85312 or this regulation, a payment for a communication to members, employees, shareholders or families of members, employees or shareholders of an organization for the purpose of supporting or opposing a candidate or ballot measure shall be regarded as a contribution or expenditure if it is paid for by a person other than the organization, its sponsored committee, or its members, employees or shareholders, or paid from funds received by the organization from a person other than the organization's members, employees or shareholders that are earmarked for the communication.

(e) A payment that is made at the behest of a candidate or committee for communications to members, employees, shareholders or families of members, employees or shareholders of an organization for the purpose of supporting or opposing a candidate or ballot measure is not a contribution to the candidate or committee at whose behest the communication was made, as provided in section 83512.

(f) If the organization is a committee organized under Government Code section 82013, subdivision (a), and therefore already subject to the reporting requirements of Chapter 4 of this title, the payment is reportable in accordance with the requirements of Government Code section 84211, subdivisions (b), (i), (j) and (k)(1), (2), (3), (4), and (6).

(g) Provisions of Government Code section 85312 and this regulation apply to communications supporting or opposing a local candidate or local measure.

NOTE: Authority cited: Section 83112, Government Code.

Reference: Sections 82015, 82025, 85303, 85212, and 85703, Government Code.